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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 125.

FRANCIS WINSLOW, AUGUSTUS JAY AND THE AMERICAN SECURITY AND TRUST COMPANY, SURSTITUTED TRUSTEES UNDER THE WILL OF CATHERINE PEARSON, DECEASED, APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINT, WASHINGTON, D. C.

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vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT.

This is a proceeding in equity brought by the Baltimore and Ohio Railroad Company, against the appellants, Francis Winslow, Augustus Jay, and the American Security and Trust Company, in their character as substituted trustees under the will of Catherine Pearson, deceased.

The object of the bill is to compel specific performance of an alleged contract for the sale and conveyance, by the trustees under the will, to the appellee, of a part of the trust estate (lots 9, 10, 11 and 12 in square 710, in the city of Washington, District of Columbia), as appears by the averments of the bill, particularly the third paragraph (Rec., p. 2), and by the second prayer for relief (Rec., p. 6). Incident-

ally and as appropriate to the main relief sought, the bill seeks to enjoin the appellees from prosecuting a proceeding at law for possession of the property in controversy and also another proceeding at law for $6,500 claimed as compensation for its use (Prayers 3 and 4; Rec., pp. 6–7).

Upon the filing of the bill a preliminary restraining order was issued (Rec., pp. 13, 14), which was continued until the final hearing (Rec., p. 32).

The cause came on for final hearing upon the pleadings and evidence before Mr. Justice Barnard, who, on the 27th of February, 1901, entered a decree, dissolving the injunction and dismissing the bill (Rec., p. 73), for the reasons set forth in his opinion filed in the cause (Rec., pp. 70–73).

From this decree the Railroad Company appealed to the Court of Appeals (Rec., p. 73).

The Court of Appeals, by its decree (Rec., pp. 83–84) and opinion (Rec., pp. 74–83), reversed the decree of the Supreme Court of the District, restored the injunction, and made the same perpetual; adjudged the Railroad Company to be entitled to a lease of the premises for five years from August 1, 1897, at the rate of $755.55 per annum, and to have the right through the exercise of power of eminent domain to acquire the use and occupation of the premises for such further and subsequent time as it should require (Rec., p. 83).

From this decree the appellants appealed to this court (Rec., p. 84).

The case arose out of the following state of facts:

Catherine Pearson, by her last will and testament dated December 4, 1862, and probated June 30, 1868 (Rec. pp. 26, 29) after making several pecuniary bequests not material to be noticed devised all the rest and residue of her estate to Carlile P. Patterson, William H. Philip and Walter S. Cox in the terms following (Rec. pp. 27–28):

> "Seventhly. All the rest and residue of my estate real and personal wheresoever situated I give and de-

vise to Carlile P. Patterson, William H. Philip & Walter S. Cox or the survivors & survivor of them to be by them held as trustees for the sole and separate use of my dear daughter Eliza Patterson during the term of her natural life & so that the same shall not be liable for the debts or subject to the control contracts or engagements of her present or any after taken husband; to permit her by herself, or her special attorney appointed in writing to be signed by her to receive the annual income & profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same & to the extent only therein expressed to have been paid :—and if she please to occupy possess and use for her own account accommodation & convenience & that of her family any part of the property real and personal so held for her separate use & benefit she shall be allowed to do so: and if at any time the said Eliza Patterson shall in writing to be signed by her in the presence of & to be attested by a subscribing witness desire the said Carlile P. Patterson, William H. Philip and Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separte use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only & to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any & every such sale of the purchaser who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use trusts & purposes & with the same powers & authority of sale and reinvestment as is herein declared of & concerning the original trust subject & separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees & their successors

shall hold the said trust subject & separate estate—original and subsequently acquired by sale and reinvestment—for the use & benefit of any child, or children, of the said Eliza W. Patterson & the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, & such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children or issue of any child or children living at the time of her death, the said trustees & their successors shall hold the said trust subject & separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trusts, then & in every such case, the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place & stead of the person or persons so dying, or becoming incapable or refusing to act and shall convey & settle the said trust subject & separate estate in such manner, that the same shall be legally vested in such continuing trustees or trustee and such person or persons so named and appointed to that office for the same uses, trusts & purposes & with the same power & authority of administration sale & reinvestment as is hereinbefore declared of & concerning the said trusts subject & estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustee or trustees and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament."

On the 1st of August, 1872, Patterson, Philip and Cox, the devisees, trustees in the will, and the Baltimore and Ohio Railroad Company entered into a lease for the premises in controversy (Rec., pp. 7 and 8). The term demised by said

lease was "the full term of five years from the first day of August instant" (Rec., p. 7). The lease also contained a privilege to the railroad company to purchase said land—

> "at any time during the term aforesaid, on payment to them by said party of the second part of the sum of twelve thousand five hundred and ninety-two dollars" (Rec., pp. 7–8).

The said lease also contained an agreement to renew in the words following:

> "That at or before the expiration of the term aforesaid, on the request of said party of the second part, its successors and assigns, they will renew this lease, with the same agreements and privileges as are herein contained for another term of five years or until such time as the said parties of the first part shall be prepared to convey the said premises as hereinbefore agreed, with a perfect title in fee-simple thereto" (Rec., p. 8).

The lease was not signed by Eliza W. Patterson.

Whether any renewal of this lease was executed does not appear in the record. Subsequently Augustus Jay and Francis Winslow became substituted trustees in the place and stead of Patterson and Philip, and on the 1st of February, 1883, another lease in the same terms as the lease of 1872 was executed by the then trustees, Walter S. Cox, Augustus Jay and Francis Winslow, and signed by Eliza W. Patterson; but her signature was not attested by any subscribing witness, nor was the lease executed by the railroad company (Rec., pp. 8 and 9).

On the 30th of January, 1888, the said trustees, Cox, Winslow and Jay, and the appellee, by its president, executed another lease of the said premises for the period of five years from the 1st of August, 1887, containing the same conditions and covenants expressed in the first and second leases, heretofore referred to. This lease was not signed by Mrs. Patterson (Rec., pp. 24 and 25).

Judge Cox retired from the office of trustee in June, 1892,

by virtue of a decree of the Supreme Court of the District relieving him from the office (Rec., p. 30), and the term demised by the lease last above described expired by its own limitations on July 31, 1892.

On October 8, 1892, the firm of Thomas J. Fisher & Co., who were agents for some property belonging to the Patterson estate (Rec., pp. 17, 44), *but not agents for this property* (Rec., pp. 17, 23, 44), wrote to Winslow, at Newberne, North Carolina, inclosing "duplicate leases with the B. & O. R. R. Co. for lots in square 710," requesting that they be executed and returned to them, and they would forward them to the company (Rec., p. 66).

These leases were prepared by the complainant or its officer (Rec., p. 23) On October 12, 1892, the same firm wrote to Winslow, at Jamestown, Rhode Island, inclosing a written offer of one J. Miller of "$50 per month for the part of square 710 leased by the B. & O. R.R. Co." And also advised him of the transmission to him at Newberne, North Carolina, of the leases sent on the 8th of October (Rec., p. 66). Winslow, believing that the leases then tendered were "in accordance with the requirements of the lease of January 30th, 1888," "signed the same under that impression" (Rec., p. 23), and sent them to Fisher & Co., in a note saying (Rec., p. 67):

> "I enclose B. & O. leases. Will you please compare with the original lease and see that they correspond before delivering. I have not a copy at hand, but I suppose Mr. Hamilton has, and if not I think the lease has been recorded."

Whether Fisher & Co. took any steps to see that the lease was proper "before delivering" does not appear.

On the 17th of October, 1892, they wrote Winslow acknowledging receipt of the leases and on the same day wrote to the agent of the railroad company transmitting the leases (Rec., p. 67). It would seem that the railroad company took

exception to the lease being signed by Winslow alone, because on October 18, Fisher & Co. telegraphed the agent of the B. & O. saying (p. 67):

> "Only Winslow & Jay represent Patterson estate. Cox resigned—no successor appointed—leaving other two to act; Jay's address, Sec'y American legation, Paris, France."

These duplicate leases of October 17, 1892, signed by Winslow in the manner and under the circumstances above stated, were never executed by Jay, the other trustee, or by Mrs. Patterson, or by the Railroad Company (Rec., pp. 17, 23); Exh. No. 3, Rec., p. 9), and both were kept by the Railroad Company in this unexecuted form until November, 1898, when they were exhibited to Winslow in the office of the Railroad Company by one of its agents (Rec., pp. 17, 23). It will be observed that this lease, signed by Winslow alone, also contained the clauses giving the company the privilege of purchase and also the privilege of renewal (Rec., pp. 9, 10.)

On the 4th of August, 1897, the Railroad Company addressed a letter to Judge Cox, requesting a renewal of the lease of October 17, 1892, for the further term of five years (Rec., p. 10). On the 8th of August, 1897, Judge Cox replied, advising the company that he was no longer trustee that Mr. Jay was in Europe, and giving Mr. Winslow's address (Rec., pp. 49, 50).

On the 10th of August the Railroad Company, by its agent, addressed a communication to Messrs. Cox, Winslow and Jay, as trustees, requesting a renewal of the unexecuted lease of October 17, 1892, for the further term of five years, which communication was sent to Mr. Winslow (Rec., p. 50). To this communication Mr. Winslow, on the 27th of September, 1897, replied as follows (Rec., p. 50):

> "In reply to your letter in relation to the renewal of the lease of the lots in square 710 of this city, I beg to say that we are now prepared to convey the

property with a perfect title, and prefer executing such conveyance to renewal of the lease.

"Very truly yours,

"FRANCIS WINSLOW,

"*Trustee.*"

In the fall of 1898 Mr. Winslow and Mr. McCubbin, the agent to the Railroad Company, had an interview on the subject of a renewal of the lease, at which no agreement was reached, Mr. Winslow denying the right of the company to a renewal of the lease (Rec., pp. 37–41).

On the 25th of January, 1899, Mr. Winslow wrote to the railroad company's agent, telling him that he had received the opinion of counsel on the subject of the lease to the effect that the lease of 1892 was then inoperative, first, because it was never properly executed, and, second, because, no matter how executed, it had lapsed in August, 1897, and that the company was, therefore, a tenant by sufferance and its tenancy subject to be terminated by ordinary process in a magistrate's court. The letter also offered to negotiate for a new lease on new terms, or for sale of the property (Rec., p. 56). The company's agent replied, acknowledging the letter of Winslow, and proceeds thus (Rec., p. 56):

> "On the other hand, our counsel advises me that we have the right to tender the money and demand a deed, but as I do not have an appropriation for this particular purchase, we prefer to arrange a lease, say, for two years, with the privilege of another year, at the same rental as the present lease, leaving out, if you prefer, the option to purchase.
>
> "This will tide us over until after the reorganization, when we will be in better shape to arrange for the purchase of the lot, if it is found to be necessary for our purposes."

The above letter was dated *February 28, 1899*; evidently from its context and the letter of Mr. Winslow of January 25, 1899, an error in the date, which should have been *January 28.*

On the 15th of February, 1899, Mr. Winslow answered the letter of Mr. McCubbin, declining his proposition to lease, and stating—

> "we prefer to sell the property rather than lease it, but neither in case of sale or lease could we be governed by conditions or prices existing some twenty-five years ago" (Rec., p. 57).

Mr. McCubbin, on the 18th of February, 1899 (Rec., pp. 12–13), replied to Mr. Winslow's letter of the 15th of that month, stating that the company's law officers insisted that the company had the right to purchase the property under the terms of the lease and giving the reasons upon which that claim of right was based. Without waiving the company's rights, however, he invited a proposition for a new lease and says (Rec., p. 12):

> "The present status of the company makes it a little troublesome to purchase property at this time, and therefore we would prefer a proposition to lease. This, I understand, you are willing to do, if we can agree upon the rental."

And he concludes said letter with the following statement:

> "To avoid any controversy at this time, I would be willing to take up the question of the amount of rental, based not upon the old lease, but upon the present value of the property" (Rec., pp 12–13).

It appears from Mr. McCubbin's letter of April 21, 1899, and Mr. Winslow's reply thereto of April 27, 1899 (Rec., p. 58), that a proposition had been submitted by Mr. Winslow in a letter of March 11, 1899, which does not appear in the record, but which was not accepted. In his letter of April 21, 1899, Mr. McCubbin again asserts the right of the company to purchase "under the agreement of October 17, 1892," and then makes an offer to purchase the property for $12,592 (Rec., p. 58).

On the 23d of January, 1900, the railroad company addressed a communication to Walter S. Cox, Francis Winslow, and Augustus Jay, as trustees of Mrs. Eliza W. Patterson (Rec., p. 13). In this letter the company declines the offer made to it through the counsel of the trustees under the will to lease the lots for a term of six years at an annual rental of $1,500, and offers to lease the property for such time as it may require the same for $1,000 per annum. In this letter the company renews the assertion of its right to purchase the property and offers to pay the purchase price named in the lease, upon the presentation of a proper deed.

Negotiations between the parties having thus failed, on January 23, 1900, notice was given to the railroad company to vacate the premises, acknowledgment of the receipt of the same being made on January 29, and on March 8, 1900, proceedings for possession under the landlord and tenant laws of the District were instituted, resulting in a judgment in favor of the trustees, without contest (Rec. p. 20). On the 24th of April, 1900, the railroad company appealed from the judgment of the justice of the peace to the Supreme Court of the District of Columbia, where the appeal is still pending, as appears by the eleventh paragraph of the bill and the eleventh paragraph of the answer (Rec., pp. 5, 6, 20).

On the 15th of August, 1900, the trustees under the will instituted a suit at law to recover $6,500, as compensation for the use and occupation of the real estate, which is also still pending (Rec., p. 6).

On the 4th of October, 1900, before either of said proceedings were reached for trial, the bill in this cause was filed.

The lots in controversy contain 41,975 square feet (Rec., p. 49). The rent reserved in the lease for this property is $755.55, and the price at which complainant seeks to purchase the fee is fixed in the lease at $12,592.

Only two witnesses were examined in the case as to the fee simple and rental values of the property, both being witnesses for the complainant. The testimony of Mr. Stell-

wagen is that the fair value of the ground is from sixty-five to seventy-five cents per square foot (Rec., p. 45). On this basis the total value of the land in controversy would be from $27,283.75 to $31,481.25.

Mr. Turpin testified that the fair rental value of the lots would be 5 per cent on the fair value of the property (Rec., p. 48), which would make the rental on the basis of Mr. Stellwagen's valuation from $1,364.18 to $1,574.06 per annum.

It will thus be seen that the complainant in its bill seeks to acquire this trust property from the trustees at a valuation of from $14,691.75 to $18,889.25 less than its present value, and to enforce a renewal of the lease at a rental of from $608.63 to $818.51 per annum less than its present fair annual rental value, as established by the testimony of its own witnesses.

Neither Mrs. Patterson nor the remaindermen, *cestius que trust* under the will, are made parties to the cause.

The bill does not allege the use to which the property is put, nor was any evidence offered on that subject.

It is nowhere alleged in the pleadings nor is any evidence offered tending to show that the company had any other foundation for right or claim to the property than such as resulted from the several leases set out in the record and hereinbefore referred to.

The Court of Appeals held that the lease executed by Winslow alone was valid and binding, and that under it the company was entitled to a renewal for five years from August 1, 1897 (Rec., p. 83).

The Court of Appeals denied, however, the right of the complainant to a specific performance of the alleged contract of sale contained in the lease, as prayed in its bill, saying (Rec., p. 82):

"We do not think that the contract is one of which specific performance should be decreed in equity under the circumstances of this case."

But the Court of Appeals in its opinion, held that (Rec., p. 76):

> "By an act of Congress of July 25, 1866 (14 Stat. 250), the Baltimore & Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of Columbia, with the same rights as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and subsequent statutes empowered it to extend said branch into the city of Washington over a specified route. This route comprised the lots of ground hereinbefore mentioned."

The Court of Appeals also held that (Rec., p. 81):

> "Over and through this land the railroad company constructed what is known as its Metropolitan branch, part of a great highway between Washington city, the adjoining States and the great West. . . . It is very clear that the appellees knew the purpose for which the land was needed, and for which it was subsequently and is now used; and that, with full knowledge of such purpose and intending that such purpose should be carried into effect, they authorized the railroad company to enter upon the land and to construct the road thereon."

The Court of Appeals also held that (Rec., p. 82):

> "In the present case the railroad company has another remedy, plain and adequate, whereby to preserve its own rights and those of the public in the premises; that of the exercise of the right of eminent domain vested in it by its charter and by the act of Congress which authorized its entrance into this city and District; and it is both its right and its duty to exercise that right by taking steps in the present suit or otherwise, as it may be advised, to ascertain the

> value of the use and occupation which it desires of the land in question and to make compensation therefor to the owners of the land."

And again (Rec., p. 83):

> "We are also of opinion that, for the time subsequent to the determination of said renewed lease for which the appellant shall require the use and occupation of said land, the appellant is entitled and it is its duty to acquire the right to such use and occupation under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained."

This was an entirely new theory of the complainant's case, not suggested by the pleadings, nor touched upon by evidence. It is nowhere alleged that the said lots are occupied by any of the company's tracks, or that they lie within the line of its right of way, or that they were or are subject to its right of condemnation under a power of eminent domain delegated to it by Congress, but, on the contrary, it bases its entire claim of right in this case upon matter of contract, and that contract a right of purchase contained in a lease.

It will be contended in this brief, entirely apart from the question of departure involved in this new theory of the complainants' case, that the complainant was not vested with the right of condemnation of this property through the exercise of the power of eminent domain; that no act of Congress conferred such power upon it, but that, on the contrary, such right was *in express terms denied to it.*

The particular acts of Congress supposed to confer the power to condemn this property not being indicated in the record, counsel has for the convenience of the court printed all the acts relating to the road up to the time of this transaction in an appendix to this brief.

The effect of the decree of the Court of Appeals is to confer upon the railroad company the right to the use of the property for the period of five years from the first day of August, 1897, at $755.55 per annum, or for the sum of $3,777.75 against the appellants' claim of $2,400 per annum for the same time, or $12,000 and perpetually to enjoin the prosecution of their suit for possession, and for the $6,500 accrued for such use and occupation, thus incurring a pecuniary loss to appellants of $8,222.25.

The further effect of the decree of the Court of Appeals was to decree *in thesi* as to the future rights of parties after the expiration of all rights under the lease, the sole subject matter of the suit. It decrees to the complainants the right to exercise, *in the future*, the power of condemnation over the appellants' property, without giving the appellants an opportunity to be heard as to whether right to exercise the power of eminent domain over appellants' property was vested in the complainant or not, against the appellants' constitutional rights.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the complainant was entitled to a renewal of the lease after July 31, 1897.

II.

The court erred in holding that the lease of October 17, 1892, signed by Winslow alone, conferred any rights upon the complainant.

III.

The court erred in holding that the complainant was at any time vested with the power of condemnation of the land described, under the right of eminent domain.

IV.

The court erred in not affirming the decree dismissing the bill.

V.

The court erred in enjoining the appellants from prosecuting their actions at law for the recovery of possession and for compensation for the use and occupation of the premises.

ARGUMENT.

I.

The Court Erred in Holding that the Complainant was Entitled to a Renewal of the Lease After July 31, 1897.

The lease dated January 30, 1888, was for the term of five years from August 1, 1887, and was formally executed by all the parties to it, but not by Mrs. Patterson (Rec., pp. 24–5).

It contained an agreement for renewal in the following terms:

> "And further that at or before the expiration of the term aforesaid, at the request of said party of the second part, its successors and assigns, they will renew the lease, with the same agreements and privileges as herein contained for another term of five years or until such time as the said parties of

> the first part shall be prepared to convey the said premises as hereinbefore agreed, with the perfect title in fee-simple thereto." (Rec., p 25.)

This was equivalent to a lease for five years certain, and for ten years at the option of the Railroad Company or until July 31, 1897.

This covenant does not amount to a perpetuity but gives the right to but one renewal.

In Hyde v. Skinner, 2 P. Wms. 196 (1723) the lease contained a covenant "to renew the Lease at the same Rent and on the same Covenants." Lord Macclesfield, in decreeing a new lease, said (p. 197):

> "Tho' the Lease is to be made on the same Covenants, yet that shall not take in a Covenant for the Renewing this new Lease; forasmuch as then the Lease would never be at an End."

In Tritton v. Foote, 2 Brown Ch. 636 (1789) the covenant was (p. 637) to—

> "execute a new lease of the said demised premises, for the further term of seven years to commence from the end of said term of twenty-one years thereby demised, subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects as are in and by the said indenture of lease mentioned and expressed."

The lessor refused to execute a new lease tendered to him, because it contained, in addition to all the other covenants, a covenant for renewal. The Chancellor, Lord Thurlow held the plaintiff entitled to a lease for seven years only, and said (pp. 638–639):

"that he had not an idea that the intention of the lessor was to renew the covenant of renewal, or that it could be so construed in a Court of Equity."

In Moore v. Foley, 6 Ves. Jr. 232 (1801), the covenant was (p. 233) to renew "under, the like rents, covenants and conditions, as were therein mentioned and contained." The Master of the Rolls, Sir William Grant, in disposing of the case, said (p. 237):

> "I agree with the late *Master of the Rolls in Baynham* v. *Guy's Hospital*; who says, 'I collect therefore from these cases this; that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal; unless it is perfectly clear, that the covenant does mean it. *Furnival* v. *Crew*, 3 Atk. 83, which is relied on in *Cooke* v. *Booth* (Cowp. 819), had clear words for a perpetual renewal; which made it impossible to construe it otherwise.'
>
> "There being no clear words in this case, nor any words relative to perpetual renewal, but the parties themselves having limited it, the question is whether the proviso, that the renewal shall be under the same rents, convenants, and conditions as the first lease shall in the absence of more positive stipulation amount to a perpetual renewal. Upon *Tritton* v. *Foote* and *Russell* v. *Darwin* I am bound to hold, that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease, not a perpetuity of leases."

In Rutgers *vs.* Hunter, 6 Johns. Ch. 215 (1822) Chancellor Kent says (p. 219):

> "If a covenant to renew the lease, necessarily included a renewal of all the covenants in it, it would be tantamount to a covenant for perpetual renewal,

> and so extraordinary a covenant ought not to depend on inference merely."

In Piggot v. Mason, 1 Paige Ch. 412 (1829), the lessor covenanted with the lessee to renew the lease at the expiration of the term, at a fair valuation, by persons indifferently chosen between the parties. On a bill for specific performance Chancellor Walworth decreed a renewal of the lease, saying (p. 415):

> "The new lease must be for a similar term, and with the like covenants and conditions inserted therein, except the covenant for renewal, which the complainant is not entitled to have inserted in the new lease, as that would, in effect, create a perpetuity."

In Carr v. Ellison, 20 Wend. 178 (1838), the lessor covenanted that he would—

> "renew the lease unto the said *William Corwin*, his executors, administrators or assigns, for the term of twenty-one years more, for and under the same yearly rents, and *under the same covenants* as is herein before granted."

The court, per Bronson, J., in passing upon the contention of the plaintiffs in error that they were entitled to more than one renewal under these covenants, says (p. 179):

> "On the construction for which the plaintiffs in error contend, the lessor covenanted in case the value of the buildings was not paid for a perpetual renewal of the lease; in other words, he agreed to renew the covenant for a renewal, as well as the other covenants contained in the lease. The courts lean against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement

> for a second renewal from a general provision for a renewal of the lease with similar covenants."

And the court further says (p. 180):

> "Although the lease was not in fact renewed at the end of the original term, the lessee and those claiming under him, had held the property for a second term of twenty-one years before this action was brought, and they have no longer any right to the possession either at law or in equity."

In Cunningham v. Pattee, 99 Mass. 248 (1868), construing a covenant to renew, the court said (p. 252):

> "The covenant to renew is not avoided for indefiniteness. The word, *ex vi termini*, imports the giving a new lease like the old one, with the same terms and stipulations; at the same rent and with all the essential covenants. . . . To this rule there is one exception, equally well established with the rule itself. The renewal covenant is not to be inserted in the new lease; that agreement is satisfied and exhausted by a single renewal. An agreement to lease *toties quoties* will not be inferred, in the absence of words clearly pointing to that intention."

In Banker v. Braker, 9 Abb. (N. S.) 411 (1880) the court said (p. 414):

> "The courts lean against such a construction of an agreement between landlord and tenant as will lead to a perpetuity, and will not infer an agreement for a second renewal from a general provision for the renewal of the lease with similar provisions."

In Syms v. The Mayor, 105 N. Y. 153 (1887), the city of New York executed a lease to Peter Lorillard for thirty years, ending on the 1st of May, 1840, and the lease con-

tained a renewal covenant in which the city agreed to redemise the premises to him for—

> "and during the term of twenty-one years thereafter, with a like covenant for after renewals of the lease as is contained in this present indenture."

In considering this covenant the court said (p. 157):

> "We are of opinion that the verdict was properly directed. The lease executed in 1810 will not be so construed as to create a perpetuity. *Rutgers* v. *Hunter*, 6 *Johns. Ch.* 215; *Carr* v. *Ellison*, 20 *Wend*, 178; *Piggot* v. *Mason*, 1 *Paige*, 412; *Banker* v. *Braker*, 9 *Abb.* (N. C.) 411. Its language is satisfied by holding that it gave the lessee the right to two renewals, and those renewals were subsequently given; and it must be assumed that the parties so understood the first lease."

The effect of these decisions beginning in England in 1723 (2 P. Wms. 196), and extending down to 1887 in New York (105 N. Y. 153), is thus expressed in Taylor's Landlord and Tenant:

> "Sec. 333. Nor will a general covenant for renewal be construed to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only. A covenant to renew a lease 'under the same covenants contained in the original lease' is satisfied by a renewal of the lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words, it was said, would naturally have been made use of indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such can not be the reasonable construction. Under certain circumstances a grant

> of this character may not be unreasonable; but still in every case the intention must be expressed without ambiguity."
>
> "Sec. 334. A covenant which does not plainly imply or express a perpetual renewal, will not, as we have said, be construed to give this right."

A further reason for limiting the covenant for renewal to a single renewal is the lack of power in the trustees to create a perpetual lease.

As before shown, the only title of the trustees and their only power over the property is confined to the life of Mrs. Patterson, after which the estate devolves upon the remaindermen, unaffected by any trust.

A perpetual lease would bar the remaindermen's rights of possession and sale, and is therefore beyond the power of the trustees. Moreover, it would absolutely defeat the right. expressly given to the beneficiary of the trust, Mrs. Patterson, by the will,—

> "to occupy possess and use for her own account, accommodation & convenience, & that of her family, any part of the property, real & personal, so held for her separate use and benefit" (Will, Rec., p. 27).

The most, therefore, that the Railroad Company could claim, under the lease of January 30, 1888, was a term for five years from August 1, 1887, and a single renewal thereof for five years or until July 31, 1897.

II.

The Court Erred in holding that the Lease of October 17, 1892, Signed by Winslow, alone, Conferred any Rights upon the Complainant.

Assuming that the trustees had the power to make the leases and covenant to renew the same, it appears by the record that the last lease executed by the parties is the one dated January 30, 1888, for five years from August 1, 1887 (Rec., p. 24).

This lease was made in the name of all the trustees and the railroad company, and was executed by all the parties to it, but not in any way assented to by Mrs. Patterson.

By its terms, it expired July 31, 1892, and if the covenant for renewal therein contained be admitted to be valid, it would have entitled the appellant to a single renewal for the further term of five years from August 1, 1892, which would expire July 31, 1897.

No formal lease was necessary to effect this renewal, but upon the demand of the company the right to the extension until July 31, 1897, would have been absolute under the lease of 1888 without any further written instrument. It was perfectly competent, however, for the parties, in 1892, upon the expiration of the term in the lease of 1888, to execute a new lease for the single term of five years therein provided for, in satisfaction of the covenant to renew, but, as above shown, they could not be required to include in such lease a clause for a further renewal, as that would create a perpetuity.

The lease of October 17, 1892, signed by Winslow alone, was not intended as a new and independent obligation of Winslow alone, but was prepared by the complainant (Rec., p. 23) in the *name of all the trustees* to be executed by all (Rec. pp. 9, 10) as a fulfillment of their joint obligation un-

der the lease of 1888 and was signed by Winslow in the belief that it was in accordance with the requirements of the previous lease (Rec. p. 23), and sent to Fisher & Co., with instructions to see that it did conform with the obligations of the lease of 1888 *before delivering it to the company* (Rec., p. 67).

Winslow, in this, was not making a new lease, nor executing a renewal of his *own* contract, but only executing, so far as he was concerned, *his part* of the contract of renewal made by Cox, Jay and Winslow in their lease of 1888, the terms and obligations of which he, as *one* of the *three* covenantors had no power to vary or enlarge.

Had it been submitted to Jay, he could have refused to execute it, or to allow it any effect, for the very reason that it contained a covenant to renew *in excess* of the obligation in the covenant of the previous lease which it was designed to fulfill.

The trustees never having agreed to give a second renewal of the lease of 1888, and being under no obligation to do so, the inadvertent and accidental act of Winslow, alone, in signing a lease which improperly contained such a renewal clause, could not bind his co-trustees nor the trust estate committed to their care.

In Sinclair v. Jackson, 8 Cow. 543, the court, after considering whether trustees could act through an attorney, said (p. 582):

> "Be that as it may, another objection is raised, which applies to both the leases, and appears to me to be insuperable. It is, that they were not executed by all the trustees who were living at the time. Mrs. Maunsell is not a party to either of them. She executed the first letter of attorney to Clarke, but did not join in the second."

After considering whether or not the lease may have been executed under the first or second power of attorney and the

orders in chancery authorizing the making of the lease, the court said (p. 583):

> "If so, it might furnish an answer to the objection made to the leases for the want of power in the trustees to lease; but is no answer to the objection, that the trustees do not all join in the lease, for their concurrence in the act was as necessary under the order of the court as under the will of the testatrix. The order authorized them, or the survivor or survivors of them, to lease, and that was the authority they derived from the will. Then was it necessary for them all to join in the lease, as demising parties, to make it effectual in law? It is a settled rule, that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary to its due execution. (*Green* v. *Miller*, 6 John. 39; *Franklin* v. *Osgood*, 14 Id. 560; 1 Caines' Cases in Error, 16; Sugd. on Powers, 162, 263.) The powers of the trustees, whether express or implied, must be executed strictly, and the principle applies equally to trusts or powers coupled with an interest, and where the trust or power will survive, as to mere naked authorities, and the leases not being executed by all the trustees who were living, are absolutely void."

The court further says (p. 583):

> "It was urged, that if the leases were defectively executed, the *cestui que trust* alone could take advantage of the defect, and that the plaintiff below could not object to them on that ground. That principle might apply to a voidable lease; but these leases are not merely defective and voidable, but absolutely void; and a stranger may object to a void instrument, for it is a nullity."

In Ridgley v. Johnson, 11 Barb. 527, a deed prepared in the name of three trustees, but executed only by two of them, is held to be void, the court saying (p. 535):

> "The judge, at the circuit, was undoubtedly right in holding that the settlement deed, executed as it

> was by only two trustees, was void, for the third trustee was in fact living at the time of execution. The power of trustees over the subject matter of the trust is equal and undivided. They can not, like executors, act separately—all must join both in receipts and conveyances."

Hill on Trustees (3d Am. Ed.), 445 (*page 305):

> "Trustees have all equal power, interest and authority, with respect to the trust estate. As a general rule, therefore, they can not act separately, but they must all join in any sale, lease or other disposition of the trust property, and also in receipts for money, payable to them in respect of their office. And in this respect they differ materially from executors, who have a joint and entire authority, and any one of whom may effectually bind, or dispose of, the assets by his own individual act."

In Latrobe v. Tiernan, 2 Md., Ch. D. 474, the chancellor said (p. 480):

> "The general doctrine does not appear to admit of dispute, that trustees have all equal power, interest and authority, and can not act separately, as executors may, but must join, both in conveyances and receipts. For one trustee can not sell without the other, or make a claim to receive more of the consideration money. As a general rule, says *Hill on Trustees*, 305, 'trustees can not act separately, but they must all join in any sale, lease or other disposition of the trust property, and also in receipts for money payable to them, in respect of their office.' And the cases, so far as I have been referred to them, are uniform in maintaining this as a general rule. They are referred to in the passage quoted from Hill, and in *2d Story's Eq., section* 1280 *in the notes.*"

Whatever rights, if any, the railroad company may have had to a renewal under the executed lease of January 30, 1888 (Rec., pp. 24, 25), and the covenant for renewal therein

contained were satisfied by the railroad company's full enjoyment of the property from August 1, 1887, to July 31, 1897.

The unauthorized inclusion in the lease of October 17, 1892 (Rec., pp. 9, 51, 52) of the *covenant for renewal*, whatever might have been its effect had the lease been executed by all the trustees, was a mere nullity, because signed by only one of the trustees, entirely apart from any question of power under the will.

The Court of Appeals has, in effect, held, that the inadvertent signing, by *one* of the trustees, of a lease, intended to fulfill the covenant for renewal contained in the previous lease, but improperly containing a covenant for a *further renewal* which the *complainant had no right to demand and the covenantors had the right to refuse*, has the effect of extending and enlarging the covenant of the covenantor who did *not* sign and who *could have refused to sign it*. Also that it binds the beneficiary of the estate and *all* the trustees to *two* renewals instead of *one*, as stipulated in the covenant of their lease of 1888.

Thus by *accident*, or by the *negligence* of *one* trustee, the complainant, for *no new or additional consideration*, is held to be entitled to a *second* renewal of the lease of 1888, when the complainant and the covenantors contracted for but one renewal.

III.

The Court Erred in Holding that the Complainant Was, at Any Time, Vested with the Power of Condemnation of the Land Described, Under the Right of Eminent Domain.

The purpose of the bill was to secure the specific performance of an alleged contract to sell and convey the lots described in the bill. The sole foundation of the complainant's demand was the leases containing the alleged

contract of sale, and the pleadings and evidence made no allusion to the existence of any right in the land independently of the leases.

Even if the complainant were vested with the right to condemn the land, under the exercise of the power of eminent domain, and that fact had been proved in the cause, it could not have availed the complainant because it is not made a ground of the relief sought, nor even alluded to in the pleadings.

In Koehler v. Black River Falls Iron Co., 2 Bl. 715, a bill was filed to foreclose a mortgage. The mortgage was regular on its face, but the answer denied that it had been validly executed and averred that the seal of the corporation had been surreptitiously affixed. The evidence conclusively established that the seal had been wrongfully affixed; this was decisive of the case (pp. 716, 717). This court held the mortgage to be "invalid and of no force and effect as a legal mortgage" (p. 718). To escape the consequence of this situation it was contended that if not good as a *legal* mortgage, yet, on the facts, it could and should be enforced as an *equitable* mortgage. With reference to this contention this court said (p. 718):

> "It is argued, that if not a legal mortgage, it is an equitable one, and that the court should not have dismissed the bill, but granted such relief as equity could give. But *this* bill seeks a foreclosure on the *sole* ground that a legal mortgage was given.
>
> "If the complainants have any rights under this instrument as an equitable mortgage, they can be tested, on a proper bill filed in another suit."

In Grosholz v. Newman, 21 Wall. 481, a bill was filed to have an absolute deed of conveyance canceled on the ground that it conveyed homestead land and was void because the wife of the grantor did not join in the execution and by reason of an adverse possession by the grantors (pp. 486–7). At the argument it was claimed that the deed was given as

a mortgage which had been paid. As to this contention the court said, by Mr. Chief Justice Waite (p. 488):

> "It is next urged in the argument that the deed was given as a mortgage to secure a debt which has been paid.
>
> "There is no allegation in the bill to support this claim. The recovery must be had upon the case made by the pleadings or not at all."

In Foster v. Goddard, 1 Bl. 506, this court, by Mr. Justice Swayne, tersely states the rule thus (p. 518);

> "In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved."

In Harrison v. Nixon, 9 Pet. 483, this court, by Mr. Justice Story, said (p. 502):

> "Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff; *so that the same may be put in issue by the answer, and established by the proofs.* The proofs must be according to the allegations of the parties, and if the proofs go to matters *not within the allegations* the court can not judicially act upon them as a ground for its decision, *for the pleadings do not put them in contestation.* The allegata and the probata must reciprocally meet to conform to each other."

In the case of Eyre v. Potter, 15 How. 42, the court, by Mr. Justice Daniel, said (p. 56):

> "And here it may be proper to premise, that in the examination of the case made by the bill, it can not be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and therefore to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated

by the complainant, and, according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of Price v. Berrington, decided by Lord Chancellor Truro, in 1851. *Vide* English Law and Equity Reports, Vol. 7, p. 254."

In the case of Reynolds v. Stockton, 140 U. S. 254, this court affirmed the judgment of the Court of Chancery of the State of New Jersey, refusing to give effect to a judgment of one of the courts of the State of New York because the subject-matter of the judment sought to be enforced was not within the issue created by the pleadings and tried before the court rendering the judgment.

Mr. Justice Brewer, delivering the opinion of this court, quotes from the case of Munday v. Vail, 34 N. J. Law, 418, *inter alia*, the following passages (pp. 268, 269):

> "The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, *the point decided must be, in substance and effect, within the issue.*"
>
> . . . . . .

> "A judgment upon a matter outside of the issue must, of necessity, *be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.* And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

Commenting upon the case of Munday v. Vail, and the quotations from the opinion in that case, this court, through Mr. Justice Brewer, says (p. 269):

> "We regard the views suggested in the quotation from the opinion as correct and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes.*"

It is nowhere suggested in the pleadings or evidence in this case that the property in question in this suit was within the line of the right of way of the Railroad Company. It is nowhere alleged that the company had, or claimed to have, the right to condemn the same to its use under the power of eminent domain. It is nowhere alleged or proved that the property was occupied for the purpose of the roadbed of the company, nor is the purpose of the bill declared to be to maintain the tracks of the company on the land. The only reference to the construction of the road contained in the pleadings is in the third paragraph of the bill, which is as follows (Rec. p. 2):

> "Third: That in 1871 and 1872 when its Metropolitan branch was being constructed within the District of Columbia by the Baltimore and Ohio Railroad Company, this complainant, negotiations were entered upon by and between said company and

Carlisle P. Patterson, William H. Philip and Walter S. Cox the original trustees under the will of Catherine Pearson deceased for the purchase of lots numbered nine (9), ten (10), eleven (11) and twelve (12) in square numbered seven hundred and ten (710), the said described lots belonging to the estate of said Catherine Pearson and their possession being useful to said company in the construction of the said Metropolitan branch".

The first prayer of the bill (Rec. p. 6) is for process. The second prayer of the bill is as follows (Rec. p. 6):

> "That said defendants, trustees, as aforesaid, be *decreed to convey to this complainant the lots described herein at the price and according to the terms of said lease of August first 1872, and the several extensions or renewals thereof*, and *if necessary for such conveyance to execute a formal lease of said lots to this complainant for the term of five years from the first day of August, 1897*".

The third prayer (Rec. p. 6) is for a preliminary restraining order against the prosecution of the two proceedings at law for recovery of possession and compensation for use and occupation. The fourth prayer (Rec. pp. 6–7) is for a perpetual injunction against the prosecution of those suits. And the last prayer (Rec. p. 7) is for general relief.

Under these pleadings the language of Mr. Justice White delivering the opinion of this court in Warner v. Godfrey, 186 U. S. 365, 377, may be appropriately applied.

> "Obviously, the defendants . . . did not on the trial introduce any evidence to rebut a claim which was not made and which was in substance at war with the theory of the case propounded against them."

The suggestion of any rights in the Railroad Company under any supposed power of condemnation through the right of eminent domain, or because of the actual establish-

ment of its right of way over the land in controversy, upon which the Court of Appeals preferred to rest its judgment, as stated in its opinion (Rec. pp. 81–83), was not made in the trial court, as appears from the opinion of Mr. Justice Barnard dismissing the bill (Rec. 71–73), but was made, for the first time, in the Court of Appeals in the brief of counsel for the Railroad Company, appellants in that court, in which it is very clearly shown how the matter could and should have been stated, in the bill, had it been intended to found the Railroad Company's claim of right wholly, or in part, upon any such theory.

On page 1 of their brief in the Court of Appeals it is stated:

> "By act of Congress dated July 25, 1866 (14 Stat. p. 250), the Baltimore and Ohio Railroad Company was authorized to extend into and within the District of Columbia its Metropolitan branch, and in 1872, when the work of construction of said branch road was under way, the line of said branch, as projected ran through the corner of square numbered seven hundred and ten, in the city of Washington, and it became useful for the company to acquire for the purposes of a right of way lots numbered nine (9), ten (10), eleven (11) and twelve (12), in said square."

It is submitted that a comparison of this passage from the brief of counsel with the third paragraph of the bill of complaint (Rec. p. 2) shows the plainest departure from the theory of the case as presented by the pleadings.

In the conclusion of their brief in the Court of Appeals, counsel for the Railroad Company, appellant there, made the following observations at pages 14 and 15:

> "IX.
>
> "There is another view of this case to be taken, and one that grows out of the particular use to which the land in question was put immediately after the lease of 1872, and which has continued down to the

present time, and which, by reason of the character and purpose of the defendant corporation, will continue to exist indefinitely.

"*Immediately after the execution of the lease in 1872 this land was occupied by the Baltimore and Ohio Railroad Company, and made a part of its right of way over which its Metropolitan branch was constructed. This use and occupation was open and notorious and well known to the trustees and to the beneficiaries under the will referred to.* If, therefore, the several contracts and agreements relied on by the company should be found to be impossible of enforcement, yet both the beneficiary and the trustees are estopped from asserting their rights to the land, and from maintaining an action to recover possession.

"*The company was permitted, as stated, to build its tracks over these lots, where they now are, and to make them a part of the right of way and road-bed of a railroad,* in the maintenance of which the public has interests which should be and are protected by courts. It is evident from the testimony in this case that an agreement to purchase was entered into in avoidance of the exercise by the company of the right of condemnation, *and it cannot be denied, under the evidence, that the trustees and Mrs. Patterson knowingly permitted the company to occupy the land in question with its tracks.* Whatever, therefore, may have been the defects in the agreement, or however wanting the trustees may have been in the power to sell, *they, with Mrs. Patterson, stood by and permitted the company to construct its tracks, and they should not now be permitted to undertake or prosecute proceedings which would enable them to sever a line of commerce which, by their assent and even permission, was constructed over these lots and has been in operation for more than a quarter of a century.*"

This court will search the record in vain for a syllable in the pleadings averring any of the facts above quoted or for any evidence tending in the slightest degree to substantiate them.

The Court of Appeals, in its opinion says (p. 81):

> "What the character of the use and occupation of the land by the company was to be, *and was understood by all the parties to be intended to be, we think also to be entirely clear. Over and through this land the railroad company constructed what is known as its Metropolitan branch*, part of a great highway between Washington city, the adjoining States, and the great West."
>
> . . . . . .
>
> "It is very clear that the appellees knew the purpose for which the land was needed, and for which it was subsequently and is now used; and that, *with full knowledge of such purpose and intending that such purpose should be carried into effect, they authorized the railroad company to enter upon the land and to construct the road thereon.*"

In view of the fact that none of the *cestuis que trust* under the will, Mrs. Patterson nor the remaindermen expectant upon the termination of her life estate, was made a party to the cause, and that, according to the record, no one of the trustees, parties to this proceeding, was a trustee until 1883 (Rec. pp.8–9), eleven years after the original transaction, it can not be perceived how they can be charged with having knowledge of what was intended or done and having acquiesced therein, especially as the bill *nowhere charges such knowledge and acquiescence* and *no testimony was offered to prove it.*

It is submitted, with all due respect to the court below, that the foregoing passages in the court's opinion are not supported by any thing in the record. Had Mrs. Patterson and the other *cestuis que trust* been made parties to this cause, and had the bill charged that the road was constructed upon the lots, and that it was so constructed with the knowledge and acquiescence of said parties, and of the then trustees, such charges could have been answered, the testimony

of Mrs. Patterson and her daughters could have been taken, as well as that of Judge Cox, the survivor of the original trustees. Not having been made parties and no such charge having been made in the bill and no evidence having been offered on the subject, the appellants naturally offered no evidence to repel matter never suggested until after the case was presented on appeal in the Court of Appeals.

Conceding for the purposes of argument, however, that the claims of the Railroad Company, made for the first time in the Court of Appeals, were within the scope of the issues made by the bill, it is respectfully submitted that the Court of Appeals erred in holding that any power existed in the railroad company to use these lots for the right of way of its Metropolitan branch or any other part of its road; but that, on the contrary, it was expressly prohibited from acquiring the same for the use of its roadbed, either by contract or by condemnation proceedings.

The only act of Congress specifically designated in the opinion of the Court of Appeals or in the brief of counsel for the railroad, in that court, is the act of July 25, 1866, 14 Statutes, 250 (Appendix to this brief, pp. 11–12).

By that act the company is given the right to extend what is called, in this case, its Metropolitan branch, into the District of Columbia, and it provides that the company shall—

> "have and exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said road, into and within the said District as they have, may exercise, or possess, or are subject to within the State of Maryland, under and by virtue of their charter or act of incorporation from the State of Maryland; and shall be entitled to the same franchises, rights, compensation, benefits, and immunities in the use of the said road as are provided in the said charter."

Under this provision, taken in connection with the charter

under the State of Maryland, it is not questioned that a power of condemnation was conferred upon the company *within the District*, as distinguished from the limits of the city.

By the second section of the act, however, an important limitation is placed upon its powers. By that section, it is enacted (App. p. 12):

> "That ALL *the provisions of* the several acts of Congress relating to the lateral road authorized to be built into and within the District of Columbia, by an act passed March second, eighteen hundred and thirty-one, and entitled 'An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Road into and within the District of Columbia,' and the supplements thereto, *be and they are hereby, declared to apply to the Baltimore and Ohio Railroad Company* so far as they are severally applicable *to the location, construction, and use by the said company of the road now authorized to be constructed* into and within the said District."

Referring, now, to the act of March 2, 1831, "*all* the provisions" of which are declared to apply to the road here authorized to be constructed, it is found that one of those provisions in *express terms forbids* the company to acquire or use, for its right of way, *squares* or *lots* in the city of Washington.

The first section of that act contains a series of *provisos* limiting the powers given, and among others the following (App. pp. 4, 5):

> "*But nothing herein contained shall be so construed as to authorize the entry by the said company upon any* LOT OR SQUARE, *or upon any part of any lot or square*, owned by the United States, or by any other body or bodies politic or corporate, *or by any individual or individuals, within the limits of the city of Washington*, for the purposes aforesaid, of *locating or constructing the said road*, or of excavating the same, or for the purpose of taking therefrom any material, *or for any other purpose or uses whatsoever;* but the said company, in

> passing into the district aforesaid, and constructing the said road within the same, shall *enter the city of Washington at such place, and shall pass along such public* STREET OR ALLEY, *to such point or terminus within the said city*, as the said company shall find best calculated to promote the objects of said road."

It is submitted that it would be difficult to frame language more specifically forbidding the location of the right of way upon *lots* or *squares*, and more distinctly confining the location of the road to public *streets* and *alleys*.

This restriction was perfectly well understood at the time, and to relieve the company from its restraint, the act of March 3, 1835, 4 Statutes, 757–58 (App. pp. 8–10), gave specific authority to go through certain specified squares, all enumerated in the first section of the act (App. p. 9), but *not including* square *seven hundred and ten*, the square involved in this proceeding.

The second section authorizes the road to traverse the enumerated squares, or any of them, to a point not west or south of the intersection of H street north with Delaware avenue, and from that point the route to final termination of the main stem is—

> "to be surveyed, and approved by the mayor, board of aldermen and board of common council of the city of Washington" (App. p. 9).

The third section of the act is as follows (App. pp. 9–10):

> "SEC. 3. *And be it further enacted*, That if the said route *from the intersection of H street and Delaware avenue* should pass through any *unimproved lots or squares* except public reservations, the said railroad company shall be, and they *are hereby, authorized to construct their road through or over the same*, upon the same terms, and with the same privileges, as are prescribed for passing through the squares enumerated in the first section of this act."

Thus it is seen that so stringent was the provision in the act of March 2, 1831, against locating the road upon any *lot* or *square* within the city, that when it came to the work of actual construction of the branch authorized by the act of 1831, it was necessary to obtain a supplementary act, authorizing the entry, upon specifically enumerated squares, for part of the route, and as to so much of the route as lay west and south of H street and Delaware avenue upon squares not enumerated.

The lots involved in this proceeding are situated about a half-mile northwest of the squares authorized to entered by the act of 1835.

The act of July 25, 1866 (App. pp. 11–12) did not specify the route to be followed by the Metropolitan branch, but only required that the *terminus* of that branch be fixed by agreement between the company and the corporation of Washington.

The Court of Appeals, in its opinion, says (p. 76):

> "By an act of Congress of July 25, 1866 (14 Stat. 250), the Baltimore and Ohio Railroad Company had been authorized to extend the Metropolitan branch of its road into the District of Columbia, with the same rights, as it held in Maryland, including the right to acquire property by purchase or condemnation for the construction and use of the road; and *subsequent statutes* empowered it to extend said branch into the city of Washington *over a specified route. This route comprised the lots of ground hereinbefore mentioned.*"

The habitual and well-known accuracy of the learned judge who rendered this opinion in the court below, and his long familiarity with the affairs of the Railroad Company, are such as to make it a matter of extreme diffidence and hesitation on the part of counsel to question the accuracy of that statement.

Unaided by the citation, either in the opinion of the court

or in the brief of counsel, of any such subsequent statutes, counsel has, in the discharge of his duty to the court and his clients, made diligent search among the statutes at large without being able to discover any such enactment by Congress as is there indicated. If he has inadvertently overlooked such statutes, counsel for the appellee will doubtless cite them in their brief with proper reference to the volume in which they are to be found.

As at present advised, counsel is compelled to contend that the learned Court of Appeals erred, in the statement quoted, as to there being any authority from Congress to the Railroad Company to acquire, by purchase or condemnation, or to use for any purpose whatsoever in connection with the the construction of its road, the lots in square seven hundred and ten.

If it should be shown that counsel for appellants is in error, and that some act of Congress did repeal the restrictions imposed by the proviso in the first section of the act of 1831 (App. p. 4) against entry upon any square or lot, still, the court erred in making a decree upon that ground, because, as before shown, such was not the theory of the bill, and no such right had theretofore been set up in the case, and the defendants never had a hearing with respect to such question.

IV.

The Court Erred in not Affirming the Decree Dismissing the Bill.

The trial court treating the case made by the bill, as it is, solely a case for granting or refusing a decree of specific performance of an alleged contract of sale, refused relief, and dismissed the bill, on the ground that the complainant had not shown a proper case to entitle it to the relief prayed (Rec. pp. 70–73).

This action of the court was entirely correct:

1. Because there never was a valid contract of sale.

2. Because of the gross inequity and lack of mutuality in the alleged agreement of sale.

3. Because no alternative case for relief was alleged, prayed or proven.

4. Because even had a right of condemnation under the power of eminent domain been vested in the company, it must have been exercised in the manner pointed out by the statute, and could not be accomplished through the medium of a court of equity.

1. There Never Was Any Valid Contract of Sale by the Trustees.

Even if the court could properly require specific performance by trustees in such a case, the record here clearly shows that there never was any valid contract of sale to be enforced.

No general power of sale is given to the trustees by the will. The only power to sell the property is conferred in the following terms:

> "And if at any time the said Eliza Patterson shall *in writing to be signed by her in the presence of & to be attested by a subscribing witness* desire the said Carlile P. Patterson, William H. Philip & Walter S. Cox or the survivors & survivor of them to sell any part of the estate real & personal held by them for her separate use *for the purpose of changing the investment thereof*, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same *for such purpose only.*" (Rec., p. 27.)

Thus it is seen that a necessary condition precedent to the power of sale is a direction by Eliza W. Patterson, "*in writing to be signed by her in the presence of and to be attested by a subscribing witness*" (Rec., p. 27). And such sale shall be "*for the purpose of changing the investment,*" and "*for such purpose only.*"

No such writing is found in the record and no witness testifies that any such ever existed. The only papers in the case signed by Mrs. Patterson are letters asking for or giving directions as to the transmission of rent (Rec., pp. 54, 55, 58–64, 68), and the lease of February 1, 1883 (Rec., pp.8,9). Mrs. Patterson's signature to this lease is not made "in the presence of" nor is it "attested by a subscribing witness" as imperatively required by the will, nor is the *option* given by the lease in any sense a fulfillment of the requirement of the will.

The power to sell being a mere power for a limited purpose must be executed in all respects in strict conformity with the terms of the will creating it.

In Powles *vs.* Jordan, 62 Md. 499, which was an action of ejectment, the court refused to admit in evidence a deed from Jordan as substituted trustee under a deed in trust to William Cock, which gave Mrs. Jordan, the beneficiary of the trust, the power to sell or devise by will all the property over which the power was to be exercised "with the approbation and consent of the said William Cock, and not otherwise" (503–4). The deed was executed with the consent of the substituted trustee, Cock, the trustee named in the deed, having died more than ten years prior to the execution of the deed. The Court of Appeals, in affirming the judgment of the court below, refusing to admit the deed in evidence, says, with reference to this power of sale (p. 504):

> "The confidence in this particular reposed in Cock was entirely personal, and did not belong to the estate, which he held as trustee. It is perfectly well settled by the authorities that where the consent of any person is required to the execution of a power, the condition must be strictly complied with; and if the person, whose consent is necessary, die before the execution of the power, and without having assented, the power is gone. *Sugden on Powers, marginal page 319.* The devise in the will of William Cock can not

> be construed into an assent to the execution of the power. It makes no reference to it in any way. As the deed to Powles purports to be made in execution of this power, and derives all its efficacy from it; and as the power was extinct and incapable of being executed, no title was conveyed to him. The court therefore properly refused to admit the evidence."

In Richardson v. Crooker, 7 Gray, 190 (1856), authority was given the executor to sell real estate which his devisee, the widow, might wish to have sold. The court, in construing this will, held that the executor had no authority to make the sale, saying (p. 191):

> "Besides; the plaintiff did not show, at the trial, any authority to sell the standing wood; and therefore it did not appear that he could, by a sale of it, give to the purchaser any lawful title thereto against the testator's widow and devisee. The testator devised all his real estate, after payment of his debts and charges of administration, to his widow, and authorized his executor (the plaintiff) to sell real estate, for the purposes of paying these debts and charges, only upon the condition that the widow should so direct. No such direction by her has been shown; nor has it been shown that any license to sell real estate has been granted to the plaintiff by the court of probate or even that such sale was necessary."

In Kissam v. Dierkes, 49 N. Y. 602 (1872), the property was conveyed to trustees for the use of Eliza B. Howell by deed which empowered the trustees (p. 603)—

> "whenever they should deem it proper to do so, by and with the consent of said Eliza, manifested by her uniting with them in any conveyance, to grant, bargain and sell, assign and transfer, absolutely and unconditionally, any part or portion of the estate."

The court said of this power (p. 604):

> "The power authorized the trustees to sell the trust property only by and with the consent of Mrs. Howell, to be manifested by her uniting with them in the conveyance. This was a valid condition attached to the power. Mrs. Howell was thereby guarded against any sale being made without her personal sanction. Such must be admitted to have been her intention in annexing this condition to the power. No provision is made for the execution of the power in case of her decease. It could, therefore, only be executed in her lifetime. There is nothing in the Revised Statutes which prohibits the annexing of such a condition or permits it to be disregarded. Mere formalities prescribed by the grantor as to the manner of executing a power may be dispensed with, but essential conditions can not."

In Alley v. Lawrence, 12 Gray, 373 (1859), a marriage settlement gave the trustees power to sell with the consent of the husband and wife, or the survivor of them. The court, considering the marriage settlement, said (p. 374):

> "But the court are of opinion that the plaintiffs had not authority to sell the undivided twelfth of the land in the aforesaid contract. . . . By this settlement the trustees were empowered to sell the real estate, with the consent, in writing, of Mrs. Foster and her husband, or of the survivor of them. By the death of Mr. and Mrs. Foster this power of the trustees was ended. Mrs. Foster, however, by the marriage settlement, retained a power of appointment, under which she might direct, by will, how the property, which was conveyed to the trustees, should be distributed among her children. But she did not retain the power to authorize or appoint a sale during that period. Her will, therefore, gave no power to the plaintiffs to sell the one-twelfth of the aforesaid land. She could not give them that authority. It follows that the defendant rightfully refused to accept their deed of the one-twelfth and pay the stipulated consideration."

In Barber v. Cary, 1 Kern. 397, the property had been conveyed to Albert G. Cary for life with power to sell the same by and with the consent of his mother, Hannah Cary, and his brother, George A. Cary. Hannah Cary died on the 9th of July, 1842, without ever having consented to an execution of the power. Albert G. Cary undertook to convey the land under the power and the subsequent grantee filed a bill to compel the consent of George A. Cary, the surviving party to the execution of the power. In the circuit the relief prayed was granted, which, on appeal to the General Term, was reversed, and judgment rendered for the plaintiff, from which decree the case was carried to the Court of Appeals. The Court of Appeals affirmed the judgment of the General Term, saying (p. 402):

> "Albert G. Cary then took under the devise a life estate, with power to alien the same by grant, by and with the consent of Hannah Cary and George A. Cary. This was a general and beneficial power. The alienation might be made to any alienee whatever, and for the benefit of the grantee of the power alone (1 R. S. 732, Secs. 78, 79). But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz., by and with the consent of Hannah Cary and George A. Cary. The first question is, whether the death of Hannah Cary, which occured before the execution of the power, was fatal to the conveyance. The rule of law is well settled, that when the consent of third persons is required to the execution of a power, that, like every other condition, must be strictly complied with. (*Sugd. on Vendors*, 319; *Simpson* v. *Hawley*, *Prec. Ch.* 472.) If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God. (*Danne* v. *Annas*, *Dyer*, 219 *pl.* 8; *Frahelien's case*, *Mod.* 62, *pl.* 172; *Munsell* v *Munsell*, *Wilmot*, 36.) So where the consent of several persons is required, the death of one of them destroys the power; for the consent of the survivor

will not satisfy the words of the power. (*Atwaters* v. *Birt*, *Cro. Eliz.* 856; *S. C.*, *Noy*, 38, *nom. Atwaters* v. *Bird*; *Butler* v. *Bray*, *Dyer*, 186 *b*; *Wilmot*, 56.)

Not only is there a total failure to comply with the formal requirements of the will, but the provision in the lease, if formally executed as the will required for a valid sale, is not a sale for the purpose of changing the investment as limited by the will. On the contrary, it is a mere *option* to the railroad company to purchase during the term of the lease.

As said by the court below in Jones v. Holladay, 2 App. D. C. 288: "The power to contract for the sale of a lot does not authorize a contract for the sale of an option."

The complainant never attempted to avail itself of this option; the option itself expired by its own terms, and Mrs. Patterson never signed any other paper in anywise relating to the sale of this property.

It is therefore clear that no valid contract for the sale of this property was ever made by the trustees, and that in addition to a lack of proper parties compellable to make specific performance, there was no proper subject-matter, no contract to be specifically enforced, before the court.

2. The Gross Inequity and Lack of Mutuality in the Alleged Agreement is a Bar to its Enforcement by a Decree for Specific Performance.

The property in controversy contains 41,975 square feet (Rec., p. 49) and the purchase price fixed in the several leases and at which the complainant sought to acquire the property is $12,592 or thirty cents per foot. The complainant's own evidence, the only testimony in the cause, shows the value of the property to be from sixty-five to seventy-five cents per square foot (Rec., p. 45), or from $27,287.75 to $31,481.25 for the whole.

It is thus demonstrated that the complainant asks a court of equity to compel the trustees to convey to it the estate of their *cestui que trust* at from $14,691.75 to $18,889.25 less than its value, an act, it is submitted, which a court of equity should rather enjoin than enforce.

The same gross inequity applies to the rental fixed in the lease.

By the testimony of complainant's witness, the fair rental value is 5 per centum on the value of the property (Rec., p. 48), which would be, according to complainant's own proof, from $1,364.18 to $1,574.06 per annum, or from $608.63 to $818.51 per annum more than the rental in the lease.

In addition to this gross inequity in the alleged contract there is an utter lack of mutuality. At no time from 1872 to the filing of this bill could the complainant have been compelled either to renew the lease or to purchase the property at the sum stipulated or at any sum.

The provisions for sale and renewal are wholly at the option of the railroad company, and this optional character is shown and distinctly availed of by the declination of the company to purchase contained in the letter of its agent of February [error for January] 28, 1899, in which he says (Rec., p. 56):

> "Our counsel advises me that *we have the right to tender the money and demand a deed*, but as I *do not have an appropriation for this particular purchase we prefer to arrange a lease.*"

And again, in the letter of February 18, 1899, he says (Rec., p. 12):

> "The present status of the company *makes it a little troublesome to purchase property at this time*, and therefore we would prefer a proposition to lease."

To the first letter above quoted from, after suggesting the lease instead of purchase, is added this statement (Rec., p. 56):

> "This will tide us over until *after the reorganization*, when we *will be in better shape to arrange for the purchase* of the lot, *if it is found to be necessary for our purposes.*"

Thus the company, though asserting the *right* of purchase, declined to exercise it at that time on the score of its own convenience, and even declined to purchase at any future time, unless "*it is found to be necessary for our purposes.*" (Rec., p. 56).

It is submitted that the trustees had no right to place the trust estate at the capricious disposition of the railroad company; that they have not done so in fact; but if they have, such an inequitable contract is not one which a court of equity will specifically enforce.

In Geiger v. Green, 4 Gill, 472, the court says (p. 477):

> "But the contract grants to the appellee the mere privilege of digging ore, and is not compulsory in its character; a privilege, to be exercised, or not, at his pleasure, imposing no corresponding obligations; and if the appellee considered the agreement into which he had entered injurious, and refused to work the mine, it is apparent from every part of this paper, that the proprietor possessed no power to enforce in a court of equity an observance of the contract.
>
> "The practical operation of an agreement of this description, is, that while the appellee may use the mine, if he finds it productive, he may refuse to do so, upon discovering that his purchase is disadvantageous, and the owner of the property would be deprived for years of the revenue, which, under other circumstances, might be derived from it.
>
> "A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore,

as unreasonable and inequitable, can never be enforced by a court of equity."

In Marble Company *vs.* Ripley, 10 Wall. 339, Mr. Justice Strong, delivering the opinion of this court, says (p. 359):

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

In Brashier v. Gratz, 6 Wheat. 528, Mr. Chief Justice Marshall, delivering the opinion of the court, said (p. 539):

> "Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at 22 dollars 50 cents per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due, the land suddenly rises to the price of 80 dollars per acre. Then he tenders the purchase money, and demands a specific performance. Had the land fallen in value he could not have paid the purchase money. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article."

And again he says (p. 541):

> "This then, is a demand for a specific performance, after a considerable lapse of time, made by a person

who has failed totally to perform his part of the contract; and it is made after a great change, both in the title, and in the value of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction.

"In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law."

In Duvall v. Myers, 2 Md. Ch. D. 401, the Chancellor says (p. 404):

"It is a conceded principle, that this branch of the jurisdiction of the court, is not a matter of right in the parties, and to be demanded *ex debito justitiae*. The application, when this arm of the court is invoked, is addressed to its sound and reasonable discretion, and is granted or rejected according to the circumstances of the case. And as was said by the Court of Appeals in *Geiger et al.* v. *Green*, decided at December term 1846, 'the court must be satisfied that the contract sought to be enforced is fair and just, and reasonable, and equal in all its parts.' The court in the same case, quote with approbation, the doctrine of Lord Redesdale in 1 *Sch. & Lef.*, 18, expressed in these terms, 'I have no conception that a court of equity ought to decree a specific performance in a case, except where *both parties had, by the agreement*, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it, because otherwise it would follow that the court would decree a specific performance where the party called upon to perform, might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance.' And after citing other authorities to the same effect, the Court of Appeals say, as the result of the cases, that, 'it is now established, that unless there is to be found *in the contract* this essential ingredient of mutuality, a court of equity will not compel its specific execution,' and in

that very case, the court said a decree for a specific execution would be refused upon the application of the party not bound by the stipulations of the contract, against the opposite party, although the party making application had been in the enjoyment of, and been actually working the ore mine which was the subject of it. In other words, as I understand the decision, the right to a specific execution of a contract, so far as this question of mutuality is concerned, depends upon whether the *agreement itself* is obligatory upon both parties, so that upon the application of either, against the other, the court would coerce a specific performance. If this be the true exposition of the case referred to, and the doctrine is, that this court will not compel one party to perform a contract unless by *the contract itself* the power of the court would be used against the opposite party, if called upon, then it follows that a party not bound by the agreement itself has no right to call upon the judicial authority to enforce performance against the other contracting party, by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of this court does not depend upon his subsequent offer to perform the contract upon his part, when events may have rendered it advantageous to do so, but upon its originally obligatory character, as was said by *Lord Redesdale*, 'this would not be equity, that a party not bound by the agreement itself should be permitted at his option, and when he finds it to his advantage to do so, to compel the other party to perform, when, if the advantage was the other way, he could not himself be coerced to performance on his part.'"

In Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274, Chancellor Kent says (p. 282):

"It is not necessary, here, to insist on another material defect in the agreement, and that is the want of mutuality; for if the defendant were bound to sell or lease, at the election of the plaintiffs, the plaintiffs were not bound to elect or to take either. It would be difficult to deduce any such obligation

from the memorandum; and it seems to be very generally, and very properly, laid down in the books, that a court of equity will never decree performance where the remedy is not mutual, or one party only is bound by the agreement."

3. No Alternative Case for Relief is Alleged or Shown by the Record.

It has already been shown, in the discussion of the third error assigned, that the bill was confined to a sole and specific claim of right and form of relief and that its prayers were appropriate to that and to nothing else.

Under these circumstances, as also there shown, though it may appear to the court through the medium of argument that some ground for relief other than that stated in the bill may in fact exist, the court is without jurisdiction to afford the relief in a case not before it and not put in contestation between the parties, and under such circumstances there is no alternative but to dismiss the bill or remand the cause for amendment.

This latter course can not be pursued unless the supposed facts, ground for relief, actually appear, by evidence in the record before the court and the relief appropriate to such state of facts be of an equitable nature.

4. A Court of Equity Would Have No Jurisdiction of the Condemnation Proceedings.

Even if a right to condemn the land under the power of eminent domain were vested in the company, the statute (App. pp. 4, 5) shows that the proceeding is one at law by a jury under the fifteenth section of the Maryland Act (App. pp. 12, 14) and not within the procedure of equity. There being, therefore, no right in the complainant to the relief sought upon the case alleged in the pleadings, and no case proved

which would be the basis of amendment, and none suggested, even in argument, appropriate to the jurisdiction of equity, the decree of the Supreme Court of the District, dismissing the bill, should have been affirmed.

V.

The Court Erred in Enjoining the Appellants from Prosecuting their Actions at Law for the Recovery of Possession and for Compensation for the use and Occupation of the Premises.

The Court of Appeals, in its opinion (Rec. pp. 81–82), held that because the complainant was a railroad company and the land in question was a part of its right of way, the public interest in the maintenace of this public highway was paramount to that of the individual, and that the Railroad Company could not be dispossessed, if it was willing to make compensation, and that an action for possession could be enjoined, pending the proceedings for the ascertainment and payment of compensation. An examination of the cases cited by the court, in its opinion, will show that the foundation of that rule is that the company *has the lawful right to occupy the land for its right of way.*

The objection to the application of that principle in this case is twofold.

First, what should never be lost sight of in this case, is, that it is nowhere alleged in the pleadings that the land in question is occupied as a part of the right of way of the company, and the bill is not supplied with either allegations or prayers appropriate to such a case.

Second. If it be true in fact, though not alleged in the pleadings or made the ground for relief in the case, that the lots in question are occupied as part of the right of way, still they are *not lawfully so occupied*, because Congress *in express terms* forbade the company from locating, by consent or otherwise, its right of way on any square or lot.

The language of the law is (App. pp. 4–5):

> "But *nothing herein contained shall* be so construed as to *authorize the entry by the said company upon any lot or square,* * * * * * *owned by* * * * * *any individual or individuals, within the limits of the city of Washington*, for the purposes aforesaid, of *locating or constructing the said road,* * * * * or *for any other purpose or uses whatsoever*; but the said company, in passing into the district aforesaid, and *constructing the said road* within the same, shall enter the city of Washington at such place, and *shall pass along such public street or alley*, to such point or terminus within the said city, as the said company shall find best calculated to promote the objects of said road."

If, therefore, the company has constructed a part of its right of way upon these lots, and leased them for that purpose, it has done so in defiance of the act of Congress, and even the express consent of the owner to use it for that purpose could not make its occupation lawful. Congress had the right to perscribe the route of the company and to confine it to the "*public streets and alleys*" and neither the private owner nor the company nor both together could abrogate the statute.

A plain prohibition, such as this is, can not be frittered away by liberal or strained construction. In the case of Pittsburgh and Lake Erie Railroad Co. v. Bruce, 102 Pa. St. 23, one of the cases cited in the opinion of the court below, the court said (p. 33):

> "Corporations take those powers which are conferred upon them by the legislature and *nothing more*. Again, the charter of a corporation must be construed *liberally as to the public*, and *strictly* as to the *grantee*. Commonwealth v. The North East Railroad Co., 3 Cas. 339. The plaintiff in error, however, inverting this rule, would have us construe its charter in such a manner as to give it not only such rights as are therein plainly granted, but also

> such as may be raised by a forced construction of that instrument. This, we need scarcely say, can not be done."

If a part of the right of way of the company is, in fact, constructed upon these lots, it is there in violation and defiance of the express enactment of Congress, and the company can not have the aid of a court of equity to sustain it in its unlawful act.

It is submitted that the decree of the court below should be reversed, the injunction dissolved, and the bill of complaint dismissed.

WM. G. JOHNSON,
Counsel for Appellants.

APPENDIX.

STATUTES REFERRING TO BALTIMORE AND OHIO RAILROAD COMPANY.

[4 Statutes, pp. 268-269.]

Chap. XLVIII.—*An Act to authorize a railroad within the District of Columbia.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the assent of Congress to the constructing a railroad by a company incorporated by the legislature of Maryland, from Baltimore to the city of Washington, be and the same is hereby given to the extent that Congress has jurisdiction of the soil over which it may pass; conceding to said company to exact such tolls, and to enjoy such benefits and privileges, as the act of incorporation of the state of Maryland gives to said corporation within the limits of the state of Maryland: *Provided,* In the location of the road it shall not be lawful for said company to pass through any of the reserved squares or open spaces of the city without the consent of Congress.

Approved, May 9, 1828.

[4 Statutes at Large, pp. 476-479.]

Chap. LXXXV.—*An Act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio railroad, into and within the District of Columbia.*

WHEREAS it is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by

an act of the General Assembly of Maryland, entitled "An act to incorporate the Baltimore and Ohio Railroad Company," passed the twenty-eighth day of February, eighteen hundred and twenty-seven, are desirous, under the powers which they claim to be vested in them by the provisions of he before recited act, to construct a lateral branch from the said Baltimore and Ohio railroad to the District of Columbia. Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad, such as the said company shall construct, or cause to be constructed, in a direction towards the said district, in connection with the railroad which they have located, and are constructing, from the city of Baltimore to the Ohio river, in pursuance of their said act of incorporation: And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the said district, as they may exercise, or are subject to, under and by virtue of their said charter or act of incorporation, in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said district from the said lateral branch or road hereby authorized, it being expressly understood that the said Baltimore and Ohio Railroad Company shall have power only to construct from the said Baltimore and Ohio railroad one lateral road within the said district, to some point or terminus within the city and county of Washington, to be determined

in the manner hereinafter mentioned; *Provided, always, and be it enacted*, That before the Baltimore and Ohio Railroad Company aforesaid shall proceed to construct any railroad which they may lay out or locate, on, through, or over any land or improvements, or to use, take for use any earth, stone, or other materials, on any land within the said district, they shall first obtain the assent of the owner of such land, improvements or materials, or, if such owner shall be absent from said district, or shall refuse to give such assent on such terms as the said company shall approve, or, because of infancy, coverture, insanity, or any other cause, shall be legally incapable of giving such assent, then it shall be lawful for the said company to apply to a justice of the peace of the county of Washington, who shall thereupon issue his warrant, under his hand and seal, directed to the marshal of the said district, requiring him to summon a jury of twenty inhabitants of the said district, none of whom shall be interested or related to any person interested in the land or materials required for the construction of the said railroad, or a stockholder, or related to any stockholder, in the said company, to meet on the land, or near to the other property or materials so required, on a day named in such warrant, not less than three nor more than fifteen days after issuing the same, to proceed to value the damages which the owner or owners of any such land or other property will sustain by the use or occupation of the same, required by the said company; and the proceedings, duty, and authority of the said marshal, in regard to such warrant and jury, and the oath or affirmation to be administered, and inquisition to be made and returned, shall be the same as are directed and authorized in regard to the sheriff, by the fifteenth * section of the said act of the General Assembly of the state of Maryland, incorporating the said Baltimore and

* For the fifteenth section of the act of Assembly of Maryland, see *infra*, pp. 12-14

Ohio Railroad Company; and all the other proceedings in regard to such jury, and the estimating and valuation of damages, and the payment or tender of payment of any damages ascertained by such valuation and effect thereof, and of the view of any lands, or other property, or materials, as to giving the said company a right to use the same for the use or construction of any railroad within the said district, as hereby authorized, shall in every case, and in every respect, be the same as is provided in and by the above-mentioned act of incorporation in regard to the railroads thereby authorized to be constructed by the said company: *Provided, also, and be it enacted*, That whenever the said company, in the construction of a railroad into or within the said district, as authorized by this act, shall find it necessary to cross or intersect any established road, street, or other way, it shall be the duty of the said company so to construct the said railroad across such established road, street, or other way, as not to impede the passage or transportation of persons or property along the same; and, where it shall be necessary to pass the said railroad through the land of any individual within the said district, it shall also be the duty of the said company to provide for such individual, proper wagon ways across the said railroad, from one part of his land to the other; but nothing herein contained shall be so construed as to authorize the entry by the said company upon any lot or square, or upon any part of any lot or square, owned by the United States, or by any other body or bodies politic or corporate, or by any individual or individuals, within the limits of the city of Washington, for the purposes aforesaid, of locating or constructing the said road, or of excavating the same, or for the purpose of taking therefrom any material, or for any other purpose or uses whatsoever; but the said company, in passing into the district aforesaid, and constructing the said road within the same, shall enter the city of Washington at such place, and shall pass along such public

street or alley, to such point or terminus within the said city, as the said company shall find best calculated to promote the objects of said road: *Provided*, That the level of said road within the said city shall conform to the present graduation of the streets, unless the said corporation shall agree to a different level: *And provided also*, That the said company shall not be permitted to take or terminate the said road west of the west side of seventh street west: *And provided also*, That the said road shall not cross, or interfere with, or infringe on the existing Washington City Canal or the Chesapeake and Ohio Canal, their waters or basins, or any other canal which may hereafter be projected and executed to connect the said Chesapeake and Ohio Canal with the aforesaid Washington City Canal in its whole extent to the eastern branch of the Potomac: *Provided also*, The rate actually charged and received on all that part of said road within the district shall not exceed three cents a ton per mile for toll, and three cents a ton per mile for transportation, except as hereinafter specified, and shall be the same each way: *Provided also*, That the privileges granted by this bill to the aforesaid railroad company shall be upon the condition that the said company shall charge the same rate of toll upon the same articles going east and west between Baltimore and Washington.

SEC. 2. *And be it further enacted*, That in addition to the charges authorized by said act of incorporation to be made by the Baltimore and Ohio Railroad Company aforesaid, the said company shall be authorized, within the said district, to make any special contract with any corporation, company or individual, for the exclusive use of any car, or of any part of, or place in, any car, or other carriage, on any railroad constructed by the said company, for a specified time or distance, or both, or for the receipt and delivery, or the transportation of merchandise or other valuable articles, in boxes, parcels, or packages weighing less than one-tenth of a ton, on such terms as may be mutually agreed on between the parties: *Provided*, That the charge for the transportation of

merchandise or other valuable articles shall not exceed one cent per mile for any single box, parcel, or package weighing less than fifty pounds, and measuring in size not more than two cubic feet; and for any heavier or larger box, parcel, or package, weighing less than one-tenth of a ton, not more than two cents per mile. And the said company, in all cases where the whole of the merchandise, produce, or other property, transported on their railroad within the said district, at any one time, belonging to the same person, copartnership, or corporation, shall weigh less than a ton, and more than half a ton, shall be entitled to charge and receive, for the transportation thereof, at the same rate per mile as if it weighed a full ton; and if the same shall weigh less than half a ton, the charge per mile may be the same as for half a ton; always estimating a ton weight to be two thousand pounds.

SEC. 3. *And be it further enacted*, That the said company are, also, hereby empowered to make such special contract with any duly authorized officer or agent of the United States, for the conveyance of the mail, or the transportation of persons or property for the use of the United States, on any railroad which has been or shall be constructed by the said Baltimore and Ohio Railroad Company, on such terms as shall be approved of by the competent officer or authority; and in all such instances, to receive the compensation so agreed for according to the terms of each contract.

SEC. 4. *And be it further enacted*, That the said railroad company may charge and receive, for taking up and setting down any passenger or traveller within the district, conveyed a shorter distance than four miles, a sum not exceeding twelve and a half cents.

SEC. 5. *And be it further enacted*, That unless the said company shall commence the said lateral railroad within one year, and complete the same with, at least, one set of tracks, within four years from the passage of this act, then this act,

and all the rights and privileges thereby granted, shall cease and determine.

SEC. 6. *And be it further enacted*, That nothing herein contained shall be so construed as to prevent the Congress of the United States from granting the same or similar privileges to those hereby granted to any other company or companies, incorporated or to be incorporated by the state of Maryland or Virginia, or by Congress, or from authorizing, by any future law, such additional railroads or roads, in connection with said road, so as to extend the same road, or to construct others connected therewith, to such parts of the district as from time to time may be required by the convenience of those parts of the district into which the said company are now restrained from carrying said road, or from enacting such rules and regulations, prescribing the speed of cars or carriages passing over said road, and other matters relating thereto, necessary for the security of the persons and property of the inhabitants of the district, in such manner as to the present or any future Congress shall seem expedient: *And provided, nevertheless*, That nothing herein contained shall be construed to give any rights or privileges to the said company, beyond the limits of the District of Columbia.

SEC. 7. *And be it further enacted*, That if the state of Maryland shall determine to construct a railway between the city of Baltimore and the District of Columbia, or shall incorporate a company for the same purpose, then similar rights, privileges, immunities, and powers, conferred by this act on the Baltimore and Ohio Railroad, be, and the same are hereby, conferred on the state of Maryland, or any company which may be incorporated by it for the same purpose, within one year after the passage of this act.

Approved, March 2, 1831.

[4 Statutes, p. 672.]

Chap. XI.—*An Act further to continue in force "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad into and within the District of Columbia".*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the period limited and allowed to the Baltimore and Ohio Railroad Company, within which they are required by the fifth section of the act entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad, into and within the District of Columbia," approved second March, one thousand eight hundred and thirty-one, to commence the road, and complete one set of tracks, be, and the same is hereby extended, and the said act shall remain in force, and all the rights and privileges thereby granted shall be vested in said company: *Provided,* They shall commence the said lateral road within one year, and complete the same, with one set of tracks, within four years from the passage of this act.

Approved, February 26, 1834.

[4 Statutes at Large, pp. 757–758.]

Chap. XXVIII.—*An Act supplementary to an act entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio railroad into and within the District of Columbia," passed December, eighteen hundred and twenty-nine.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Baltimore and Ohio Railroad Company be, and they are hereby, authorized to locate and construct their said road

within the city of Washington, through squares nine hundred and nine, eight hundred and eighty-eight, eight hundred and fifty-eight, eight hundred and thirty-two, nine hundred and eight, eight hundred and eighty-seven, eight hundred and fifty-six, eight hundred and fifty-seven, eight hundred and thirty-one, eight hundred and seven, seven hundred and seventy-six, seven hundred and fifty-one, seven hundred and eighteen, in the same manner, and with the same rights and privileges which are granted to them by the act to which this is a supplement, for the construction of their said road within the District of Columbia, beyond the limits of the city of Washington, anything in the said act contained to the contrary notwithstanding, and the assent of Congress is hereby given to the construction of the said railroad through or over any of the said lots or parts of lots which are owned by the United States.

SEC. 2. *And be it further enacted*, That the main stem of the said railroad, after passing through the squares or lots above-named, or any of them, shall not be constructed west or south of a point at the intersection of H street north, with Delaware Avenue until the route from that point to the final termination of the main stem of said road shall be surveyed and approved by the mayor, board of aldermen, and board of common council of the city of Washington; and when the said route shall be so surveyed and approved, the said company shall be, and they are hereby, authorized to construct the said railroad on the said route, under such restrictions and conditions as may be agreed upon by the said railroad company and the mayor, board of aldermen, and board of common council of the said city of Washington.

SEC. 3. *And be it further enacted*, That if the said route from the intersection of H street and Delaware Avenue should pass through any unimproved lots or squares except public reservations, the said railroad company shall be, and

they are hereby, authorized to construct their road through or over the same, upon the same terms, and with the same privileges, as are prescribed for passing through the squares enumerated in the first section of this act.

SEC. 4. *And be it further enacted*, That the said company are further authorized to construct branches of their road from the main stem thereof, within the said city, to such place or places, and in such number of tracts, (*sic*) as the corporate authority of the city of Washington shall assent to or permit: *Provided*, That the said branches shall not pass through any of the public reservations.

SEC. 5. *And be it further enacted*, That it shall be lawful for the said company, and they are hereby empowered to obtain, by gift or purchase, any lot or lots adjacent to any street or avenue along which the said company shall construct their said road or branches, and to hold and improve the same in such manner as may be necessary for the purposes of said company, or for the beneficial use of said road, or the branches thereof; and the said company shall be authorized to extend and construct tracks of railway into any lot or lots so held by them, in connection with the tracks in any adjacent street or avenue: *Provided*, That the free use of any street or avenue shall not be impaired thereby: *And provided, also*, That the said company shall not use or employ any steam engine in drawing or propelling the cars, wagons, or other vehicles, on any part of the said road within the city of Washington, except in such parts as may be agreed to by the corporate authorities of said city.

SEC. 6. *And be it further enacted*, That such provisions of the act to which this is a supplement, as are inconsistent herewith, be, and the same are hereby, repealed.

Approved, March 3, 1835.

[14 Statutes at Large, page 250.]

Chap. CCLI.—*An Act to authorize the Extension, Construction and Use by the Baltimore and Ohio Railroad Company of a Railroad from between Knoxville and the Monocacy Junction into and within the District of Columbia.*

WHEREAS it is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by the State of Maryland, are desirous of extending the road authorized to be built by them, by an act of the general assembly of that State, entitled "An act to authorize the Baltimore and Ohio Railroad Company to build a railroad from a point on the line of its road between Knoxville and the Monocacy Junction, through Frederick and Montgomery counties, to the boundary of the District of Columbia, so as to make a direct communication with the city of Washington," into and within the District of Columbia: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Baltimore and Ohio Railroad Company shall be, and they are hereby, authorized to extend into and within the District of Columbia the road aforesaid, to such point or points, terminus or termini, as may be agreed upon between the said company and the corporation of Washington, in respect of a road within the limits of Washington, and between the said company and the corporation of Georgetown, as respects a road within the limits of Georgetown. An[d] the said Baltimore and Ohio Railroad Company are hereby authorized to have and exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the extension and construction of the said road, into and within the said District as they have, may exercise, or possess, or are subject to within the State of Maryland, under and by virtue of their charter or act of incorporation from the State of Maryland; and shall be entitled to the same franchises,

rights, compensation, benefits, and immunities in the use of the said road as are provided in the said charter.

SEC. 2. *And be it further enacted*, That all the provisions of the several acts of Congress relating to the lateral road authorized to be built into and within the District of Columbia by an act passed March second, eighteen hundred and thirty-one, and entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Road into and within the District of Columbia," and the supplements thereto, be, and they are hereby, declared to apply to the Baltimore and Ohio Railroad Company so far as they are severally applicable to the location, construction, and use by the said company of the road now authorized to be constructed into and within the said District.

SEC. 3. *And be it further enacted*, That the said railroad company shall commence the construction of said extension of said road within one year, and complete the same within three years after the passage of this act; and on failure to do so, the privileges granted by this act shall be forfeited by said company.

Approved, July 25, 1866.

Act of Assembly of Maryland of February 28, 1827.

(Session Laws of 1826-7, Chap. 123.)

The fifteenth section of the Act of Assembly of Maryland of February 28, 1827, incorporating the Baltimore and Ohio Railroad Company referred to in the first section of the Act of Congress approved March 2, 1831, (*Supra p. 3*) is as follows:

15. *And be it enacted*, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone,

or other materials, or any improvements which may be wanted for the construction or repair of any of said roads, or of any of their works, for the purchase or use and occupation of the same, and if they can not agree, or if the owner or owners, or any of them, be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace of such county who shall thereupon issue his warrant, under hand and seal, directed to the sheriff of said county, requiring him to summon a jury of twenty inhabitants of said county, not related nor in anywise interested, to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same, and if at said time and place any of said jurors summoned do not attend, the said sheriff shall immediately summon as many jurors, as may be necessary with the jurors in attendance, to furnish a panel of twenty jurors in attendance, and from them each party or its, his, her, or their agent, if either be not present in person or by agent, the sheriff for him, her, it or them may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them on (*sic*) oath or affirmation, as the case may be, that he will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same required by the company; and the jury in estimating such damages shall take into the estimate the benefit resulting to the said owner or owners from conducting such railroad through, along or near, to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary, filed in his court, and

shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed, shall be recorded by said clerk or prothonotary, at the expense of said company, but if set aside, the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same, valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received from the company, without costs, by the said owner or owners or his, her or their legal representative or representatives.